No. 05-1157

In the Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, FKA CREDIT SUISSE FIRST BOSTON LLC., ET AL., PETITIONERS

v.

GLEN BILLING, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING VACATUR

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QUESTIONS PRESENTED

1. Whether an antitrust complaint predicated on alleged collusive activity in the securities markets must, in order to survive a motion to dismiss on grounds of implied antitrust immunity, set forth allegations sufficient to support a reasonably grounded expectation that the plaintiff's claims do not rest on collaborative activities that are either permitted under the securities laws or inextricably intertwined with such permissible activities.

2. Whether conduct that is prohibited under the regulatory scheme governing public offerings of securities is categorically immune from liability under the federal antitrust laws because of the extensive regulatory authority exercised by the Securities and Exchange Commission over such conduct.

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INTEREST OF THE UNITED STATES

This case involves the relationship of two federal statutory regimes that are critical to the efficient functioning of our economy. The federal antitrust laws seek to further "our fundamental national economic policy" of competition, *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 372 (1963), while the securities laws regulate and preserve the integrity of the capital formation process. The United States has a substantial interest in ensuring that those two critically important statutory schemes are reconciled in a manner that gives effect to both, "rather than holding [either] one completely ousted," *National Gerimed. Hosp. & Gerontology Ctr.* v. *Blue Cross*, 452 U.S. 378, 392 (1981). The Court recognized

those important federal interests in inviting the views of the United States at the certiorari stage.

STATEMENT

1. Respondent Billing and others filed this putative class action on behalf of themselves and other persons who purchased shares of certain companies through initial public offerings (IPOs) or in the immediate aftermarket following those IPOs. Respondents' suit alleges that petitioners, investment banks that underwrite IPOs as well as various institutional investors, violated Section 1 of the Sherman Act, 15 U.S.C. 1 (Supp. IV 2004). The overarching theory of respondents' complaint, set forth under the heading "Summary of Allegations," is that petitioners agreed among themselves "to require from customers consideration in addition to the underwriters' discount * * * for allocations of shares of initial public offerings of certain technology-related companies * * * and to inflate the aftermarket prices for such Class Securities." Consolidated Amended Class Action Complaint ¶ 1 (Jan. 2, 2002) (Am. Compl.).[1]

Respondents allege, in this "Summary" section, that petitioners entered into an agreement to impose tie-in arrangements—*i.e.*, that they would require IPO customers to pay consideration in addition to the stated offering price for IPO securities, including the payment of inflated commissions on other securities or "commitments to purchase other, less at-

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[1] The Amended Complaint also alleges violations of state antitrust law. Am. Compl. ¶¶ 84-109. Respondent Pfeiffer's separate class action complaint on behalf of aftermarket purchasers alleges that "the underwriter defendants paid bribes to, or accepted bribes from, the institutional defendants, in a course of conduct designed to inflate the price of particular securities," in violation of Section 2(c) of the Robinson-Patman Act, 15 U.S.C. 13(c). Pet. App. 18a-19a. Like the court of appeals' opinion, this brief focuses on the Billing complaint, and references herein to the "complaint" are to the amended complaint filed in that action.

tractive securities." Am. Compl. ¶¶ 4(a), 6. In addition, the complaint alleges that petitioners agreed to require "laddering" arrangements—a form of tie-in under which, "in order to obtain IPO shares of a Class Security, customers had to place bids for and/or purchase quantities of such Class Security in the aftermarket at prices above the IPO price." *Id.* ¶¶ 4(b), 7.

In another section of respondents' complaint, under the heading "The Making and Implementation of Defendants' Unlawful Agreement," Am. Compl. 19, respondents specify the particular acts that petitioners are alleged to have taken as part of the asserted agreement. Respondents allege that petitioners "implemented their unlawful * * * agreement through and in connection with their agreements to combine together into underwriting syndicates." *Id.* ¶ 49. Petitioners are alleged to have "communicated and worked together as co-underwriters and members of underwriting syndicates" (with lead underwriters using the same co-underwriters repeatedly), "collaborated with one another in trade organizations" and "as members of the National Association of Securities Dealers, Inc.," "combined to create various joint ventures in the securities market," and had "meetings among their top investment bankers, legal officers and marketing managers." *Id.* ¶¶ 45-48, 50. Petitioners are further alleged to have hosted "road shows" and conducted other communications with customers before the IPOs, during which petitioners, "at times jointly, made inquiries of customers or others interested in purchasing Class Securities concerning the number of shares that such person would be willing to purchase in the aftermarket and the prices such person would be willing to pay for such shares." *Id.* ¶ 54. The complaint also alleges that petitioners agreed to disclose to each other the identities of their respective IPO customers and to share data about them, including their trades, "[i]n order to monitor whether

the customers complied with the preconditions to receiving allocations." *Id.* ¶ 56.

2. Petitioners moved to dismiss the complaint on the ground that the regulatory scheme established by the securities laws impliedly precludes application of the antitrust laws to petitioners' conduct in connection with the issuance of securities through underwriting syndicates. The district court granted the motion. Pet. App. 72a-122a.[2] The court held that "the [Securities and Exchange Commission (SEC)] explicitly permits much of the conduct alleged" in the complaint, which it described as "a general indictment of the syndicate system" authorized by the securities laws. *Id.* at 86a, 89a; see *id.* at 86a-93a. The court did not, however, limit its dismissal to those claims or allegations that were premised on permitted conduct. Nor did the court give respondents an opportunity to re-plead their claims based solely on conduct that is neither permitted by the securities laws nor inextricably intertwined with such conduct. The district court recognized that the "tie-in, laddering and other aftermarket agreements alleged" in the complaint are prohibited under the securities regulatory scheme, but it concluded that even such conduct enjoyed blanket immunity from antitrust liability in light of the SEC's "broad general authority to regulate IPO allocation and underwriter commission practices." *Id.* at 94a, 103a. The court dismissed the complaint "with prejudice as against all defendants." *Id.* at 121a.

3. The court of appeals vacated and remanded for further proceedings consistent with its opinion. Pet. App. 1a-71a. The court acknowledged that the underwriting syndicate process, including certain types of manipulations "deemed 'stabilizing' activities," is permitted under the securities laws. *Id.* at

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[2] The district court did not reach petitioners' alternative arguments that respondents lacked standing and that the complaints failed to allege any antitrust offenses. See Pet. App. 76a.

9a. But because the complaint also alleged "tie-in" and "laddering," conduct that the SEC classifies as unlawful manipulation, *id.* at 13a-16a, the court of appeals held that the "heart of the alleged anticompetitive behavior finds no shelter in the securities laws." *Id.* at 4a.[3]

The court of appeals recognized "the guiding principle that, where possible, 'the proper approach'" to the question of implied antitrust immunity "is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." Pet. App. 49a-50a (quoting *National Gerimed. Hosp. & Gerontology Ctr.* v. *Blue Cross*, 452 U.S. 378, 392 (1981), and *Silver* v. *NYSE*, 373 U.S. 341, 357 (1963)). Under that principle, the court concluded, implied antitrust immunity may be found only in two narrowly defined situations. *Id.* at 49a.

First, the court held that "pervasive regulation" by the securities laws may warrant a finding of implied antitrust immunity if "the activities of [a self-regulatory organization (SRO)], extensively regulated by the SEC, are challenged as anticompetitive." Pet. App. 50a. Second, the court held that

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[3] The district court and the court of appeals had requested the views of the SEC and the Department of Justice separately on the issue of implied antitrust immunity. The SEC argued in a letter brief that "antitrust immunity is appropriate in the intensely regulated area of registered offering underwriting to protect the effectiveness of the regulatory regime * * * even in some cases where it may not be clear that the Commission could (or ever would) authorize the specific conduct alleged by particular plaintiffs." Pet. App. 192a. The Department of Justice took the position in a letter brief that petitioners are "entitled to implied immunity for conduct expressly or implicitly approved by the securities laws or SEC regulations," but that "the allegations of tying and laddering—practices that are strictly prohibited under the securities laws and that the SEC has never permitted or proposed to permit—should not be dismissed on implied immunity grounds." *Id.* at 207a. See *id.* at 124a-158a. Neither filing below expressly urged the test advocated in this brief, which reflects the considered view of the United States.

implied immunity may also be warranted when there is a "potential specific conflict" between "the antitrust laws prohibiting a specific activity * * * and a regulatory regime compelling or permitting that activity." *Id.* at 51a. Based on its analysis of this Court's decision in *Gordon* v. *NYSE*, 422 U.S. 659 (1975), the court identified five factors in potential conflict situations that inform the "touchstone" determination whether Congress intended to repeal the antitrust laws: "(1) congressional intent as reflected in legislative history and a statute's structure; (2) the possibility for conflicting mandates; (3) the possibility that application of the antitrust laws would moot a regulatory provision; (4) the history of agency regulation of the anticompetitive conduct; and (5) any other evidence indicating that the statute implies a repeal." Pet. App. 53a, 57a; *id.* at 51a-57a.

Respondents had urged that a conflict would exist if the SEC "could permit" the challenged conduct (Pet. App. 62a), and the Department of Justice had argued that the principal question was whether the conduct alleged in the complaint was "expressly or implicitly approved by the securities laws or SEC regulations," *id.* at 207a. The court of appeals rejected the contention that "immunity applies to whatever conduct the SEC could permit under its regulatory regime" in favor of "a legal framework *more* favorable to plaintiffs than the doctrine they [or the United States] have pressed." *Id.* at 62a. The court held that a "potential specific conflict" is a "necessary"—but not sufficient—"component of implied immunity," and "is simply the essential starting point" of the implied immunity analysis. *Id.* at 51a, 53a; see *id.* at 57a. The court determined that further inquiry, based on "the insights of the *Gordon* opinion," is still necessary to determine "whether there is any evidence of an implicit congressional intent to repeal the antitrust laws." *Id.* at 53a.

The court of appeals concluded that neither a pervasive regulation nor a specific conflict rationale justified the district court's order of dismissal in this case. Pet. App. 60a-70a. In rejecting petitioners' pervasive-regulation argument, the court of appeals noted that "the NASD and the SEC share a relationship that is quite different from SEC regulation of private business activities," and that the implied immunity in *United States* v. *National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694 (1975), was limited to activities that were approved by the SEC or that implemented approved conduct. Pet. App. 67a-70a.

The court of appeals also held, based on its analysis of the *Gordon* factors, that there was no potential for specific conflict between the antitrust and securities laws. Focusing on the complaint's allegations of tie-in and laddering agreements, the court noted that there is no legislative history suggesting an intent to immunize such conduct, nor would application of the antitrust laws to such conduct be inconsistent with or "render[] nugatory" any provision of the securities laws. Pet. App. 64a-66a. The court saw no "potential for irreconcilable mandates" because neither petitioners nor the SEC urged "the Commission's power to force tie-in conspiracies or to force underwriters to offer tie-in agreements linked to IPO allocations." *Id.* at 64a-65a.

The court of appeals recognized, Pet. App. 61a n.47, that "the complaint details a host of conduct recognized as legitimate by the SEC" but, rather than affirming dismissal of the complaint with respect to such conduct, the court treated the complaint's reliance on permissible conduct as presenting only a question of the evidence upon which respondents could rely. It found "no basis for grounding the immunity analysis in evidentiary considerations," and viewed the answer to the immunity question as "not vary[ing] with different evidentiary strategies." *Ibid.* It "le[ft] to the district court the task

of ensuring that defendants do not suffer prejudice from any evidence of their legitimate activities." *Ibid.* The court also noted that, "'just as regulatory context may in [some] cases serve as a basis for implied immunity, it may also be a consideration' in the application of antitrust law," such as by supporting application of the rule of reason rather than a per se prohibition. *Id.* at 58a (quoting *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398, 412 (2004)).

Accordingly, the court of appeals rejected petitioners' implied immunity defense in its entirety, holding that "we find no [implied] repeal." Pet. App. 70a. The court vacated the district court's dismissal on immunity grounds and remanded for consideration of "alternate grounds to support the district court's dismissal." *Ibid.*

SUMMARY OF ARGUMENT

The federal regulatory regime governing public offerings of securities authorizes a substantial amount of collaborative conduct that might otherwise violate the antitrust laws, and this Court has emphasized the need for a "proper reconciliation of the regulatory and antitrust statutes," *Gordon* v. *NYSE*, 422 U.S. 659, 685 (1975). That reconciliation should give effect to *both* statutory schemes, "rather than holding one completely ousted." *Silver* v. *NYSE*, 373 U.S. 341, 357 (1963).

I. An adequate accommodation of those two critically important statutory schemes recognizes that antitrust immunity must be extended not only to collaborative conduct specifically authorized under the securities regime, but also to activities that are inextricably intertwined with permitted collaboration. As the Court held in *United States* v. *National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694 (1975) (*NASD*), antitrust liability cannot be premised on conduct that is "ancillary" to collaborative activities that the securities laws en-

dorse. *Id.* at 733-734. Moreover, to give full effect to such immunity, the law precludes drawing inferences of illegal activity from conduct that is itself protected. See *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 142-143 (1961).

Giving effect to the securities regulatory scheme does not, however, require conferring antitrust immunity for all conduct of underwriters in connection with IPOs. This Court has repeatedly rejected the view that all conduct regulated under another statutory scheme enjoys "a blanket exemption" from antitrust law, *National Gerimed. Hosp. & Gerontology Ctr.* v. *Blue Cross*, 452 U.S. 378, 392 (1981), and has required a more particular showing of "repugnancy between the antitrust laws and the regulatory system," *NASD*, 422 U.S. at 719-720. The broad immunity urged by petitioners would improperly shield anticompetitive conspiracies that are distinct and separable from the permitted activities of an underwriting syndicate.

II. Neither the court of appeals nor the district court adequately accommodated the interests of the two critical statutory frameworks at issue. The court of appeals focused its immunity analysis on the general allegations in respondents' complaint that petitioners engaged in tie-in and laddering activities that are unlawful under the securities regulatory regime. Although the court recognized that many of the complaint's more specific factual allegations recite collaborative conduct that is permitted under the securities laws, the court dismissed that problem as a mere evidentiary issue, distinct from the immunity analysis. Under a proper approach to implied antitrust immunity, the court should have recognized the immunity not only of collaborative activities that are specifically permitted under the securities laws, but also of those activities that are inextricably intertwined with permitted conduct. Moreover, the court should have made

clear that protected conduct—if it is to remain protected—cannot give rise to inferences of illegality. Accordingly, to the extent that the complaint is ambiguous whether the specific conduct on which respondents premise their broad allegations of illegal tie-ins and laddering is itself entitled to immunity, respondents must re-plead to make clear that they do not rely on allegations of protected conduct as a necessary component of their antitrust claim. In categorically rejecting petitioners' immunity defense and thereby precluding further consideration of the defense on remand, the court of appeals failed to give adequate effect to the securities laws.

On the other hand, the district court's dismissal of the complaint with prejudice, based on the SEC's "broad general authority to regulate IPO allocation and underwriter commission practices," Pet. App. 94a, was likewise in error and gives too little weight to the antitrust laws and their fundamental policy of competition. The motion to dismiss should have been considered according to the principles articulated above and, if granted, respondents should have been given an opportunity to re-plead their complaint without reliance on immune conduct. In order for respondents' claims to be allowed to go forward, they must allege facts providing concrete notice and giving rise to a reasonably grounded expectation that the alleged antitrust offense can be established without relying on activities that are authorized under the regulatory scheme or inextricably intertwined with such authorized activities.

ARGUMENT

I. A PROPER ACCOMMODATION OF THE SECURITIES AND ANTITRUST LAWS SAFEGUARDS THE POLICIES OF EACH, RATHER THAN PROMOTING ONE STATUTORY SCHEME TO THE EXCLUSION OF THE OTHER

On numerous occasions, this Court has confronted the "problem of reconciliation of the antitrust laws with a federal

regulatory scheme." *Gordon* v. *NYSE*, 422 U.S. 659, 660 (1975). The need to harmonize the strictures of the federal antitrust laws with federal regulatory policy is particularly acute when the regulatory scheme authorizes competitors to collaborate in ways that might otherwise constitute an antitrust violation. The Court has made clear that the "proper approach" to a claim that a federal regulatory statute impliedly repeals the antitrust laws with regard to challenged conduct "is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." *Silver* v. *NYSE*, 373 U.S. 341, 357 (1963). Indeed, the Court has described the admonition to give effect to both regulatory policies as the "guiding principle" for resolving claims of implied antitrust immunity. *National Gerimed. Hosp. & Gerontology Ctr.* v. *Blue Cross*, 452 U.S. 378, 392 (1981) (*National Gerimed.*). That principle can, and should, be given effect in this case.

A. Antitrust Immunity Extends Not Only To Collaborative Underwriting Activity That Is Expressly Or Implicitly Authorized Under the Securities Laws, But Also To Conduct That Is Inextricably Linked To Such Activity

1. The securities laws permit collaboration by competitors in a number of ways. For example, as the Court has observed, the securities laws evince a "policy of self-regulation" that necessarily "contemplates that the Exchange will engage in restraints of trade which might well be unreasonable absent sanction" by the securities laws. *Silver*, 373 U.S. at 360. See *id.* at 353 (noting that 15 U.S.C. 78f(b) "specifically requires" that a securities exchange "formulate rules governing the conduct of exchange members").

Congress and the SEC have likewise expressly permitted collaboration among underwriters through IPO syndicates —"an essential means" by which underwriters manage and

share risks in underwriting public securities offerings. Pet. App. 5a; 15 U.S.C. 77b(a)(3) (excluding "agreements * * * among underwriters who are or are to be in privity of contract with an issuer" from regulation as offers to buy or sell securities); *Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations*, 70 Fed. Reg. 19,674-19,675 (2005) (*Commission Guidance*) (describing "the IPO book-building process"). "A lead underwriter in a syndicate must assess the appropriate issue quantity and pricing for the IPO[,] * * * a difficult task, in which the lead underwriter is aided in part by 'book building.'" Pet. App. 6a (citations omitted). As part of the authorized book-building process, the underwriters discuss price and demand with the issuer and potential investors, and ultimately "agree on the size and pricing of the offering, and * * * how to allocate the IPO shares to purchasers." *Commission Guidance*, 70 Fed. Reg. at 19,675. Such conduct could, absent the framework of securities regulation, raise antitrust concerns.

Congress was well aware of the syndicated underwriting system when it enacted the Securities Act of 1933, 15 U.S.C. 77a *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*, and the legislative and regulatory history of those Acts demonstrates that Congress chose regulation rather than prohibition. See generally Pet. App. 4a-6a, 133a-136a. Collaborative activity in the formation and operation of an underwriting syndicate that is permitted by the securities laws must therefore be deemed immune from challenge under the antitrust laws.

2. Antitrust immunity is not, however, limited to conduct that is expressly or implicitly authorized under the securities laws. Contrary to the view seemingly expressed by the court of appeals, a proper reconciliation of the antitrust and securities statutes requires recognition of antitrust immunity for conduct that is directly related to and cannot practicably be

separated from permissible conduct, whether or not that inextricably intertwined conduct itself is authorized under the securities laws. Failure to recognize immunity for activities that are inextricably intertwined with permissible collaborative conduct could effectively vitiate the immunity for the authorized conduct and thus bring the antitrust laws into conflict with the regulatory scheme.

As this Court recognized in *United States* v. *National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694 (1975) (*NASD*), implied antitrust immunity extends to conduct that implements an agreement that is itself approved under a federal regulatory regime, because an antitrust challenge to such conduct could interfere with the regulatory scheme. In *NASD*, the Court considered an antitrust challenge to vertical agreements by which mutual funds sought to restrict the secondary market for their shares, and to a horizontal agreement among members of the NASD to inhibit the growth of a secondary market. *Id.* at 701-702. The Court held that implied antitrust immunity encompassed not only the vertical restraints, which had been authorized by Congress and accepted by the SEC, *id.* at 728, but also the horizontal agreement to encourage such restrictions, *id.* at 733-734, which had not itself been specifically approved by the SEC. The immunity conferred by SEC approval of the vertical restrictions precluded an "attack on the ancillary [horizontal] activities." *Id.* at 734. As the Court explained, "maintenance of an antitrust action for activities so directly related to the SEC's responsibilities poses a substantial danger that appellees would be subjected to duplicative and inconsistent standards." *Id.* at 735. Conduct ancillary to authorized collaborative activity thus acquires "a kind of derivative immunity." *Phonetele, Inc.* v. *AT&T.* 664 F.2d 716, 729 (9th Cir. 1981) (Kennedy, J.), cert. denied, 459 U.S. 1145 (1983).

In other contexts as well, the Court has extended the umbrella of immunity to activity that is inextricably interrelated with core immune conduct. For example, under the *Noerr-Pennington* doctrine, a person or group cannot be held liable under the antitrust laws for petitioning the government to take action that will harm competition. See *United Mine Workers* v. *Pennington*, 381 U.S. 657, 669-670 (1965); *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 142-143 (1961) (*Noerr*). Moreover, the Court has held that *Noerr-Pennington* immunity extends to a claim based on "some direct injury" to a competitor that is itself "an incidental effect" of the permissible campaign to influence the government. *Id.* at 143. See *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 499 (1988) (an anticompetitive restraint "cannot form the basis for antitrust liability if it is 'incidental' to a valid effort to influence governmental action"). Outside the antitrust context, the Court has held that the exacting First Amendment standards applicable to noncommercial speech apply as well to statutory limitations on commercial speech when the "component parts of a single speech are inextricably intertwined." *Riley* v. *National Fed'n of the Blind*, 487 U.S. 781, 796 (1988).

3. The foregoing principles also limit a plaintiff's ability to establish an antitrust violation involving unapproved conduct by means of inferences drawn from evidence of conduct that is expressly or implicitly authorized under a regulatory regime. In an ordinary antitrust case, "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case," *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588 (1986), but a finder of fact could, under appropriate circumstances, infer the existence of a conspiracy in violation of the antitrust laws from evidence of discussions among the alleged conspirators, combined with sufficiently probative implementing conduct, see, *e.g.*, *United*

States v. *Foley*, 598 F.2d 1323 (4th Cir. 1979), cert. denied, 444 U.S. 1043 (1980). Thus, setting aside the regulatory context, a plaintiff might urge a finder of fact to interpret ambiguous evidence concerning meetings among underwriters and subsequent discussions with potential IPO investors regarding their interest in acquiring additional shares beyond the initial IPO allocation as evidence that the underwriters entered into an agreement to require IPO customers to make future purchases outside the context of the IPO.

But in light of the securities regulatory structure, such an inference would be inappropriate. As an initial matter, of course, the SEC explicitly permits discussions among underwriters in an IPO syndicate, and thus evidence that such discussions occurred vel non would have no probative value in establishing that the underwriters were conspiring to engage in unauthorized conduct. See *Verizon Comme'ns Inc.* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398, 412 (2004) (*Trinko*) (noting the importance of regulatory context in the application of the antitrust laws). More fundamentally, imposition of antitrust liability (or even allowing the unleashing of costly discovery) on the basis of inferences drawn from permissible book-building activities would inevitably discourage such activities, thereby bringing the antitrust laws into direct conflict with the regulatory scheme. Accordingly, implied immunity must extend to allegations of antitrust violations that rest on inferences to be drawn from collaborative activity by syndicate members that is either permissible in itself or is so closely related to authorized collaboration that it cannot practicably be separated or distinguished from authorized conduct.

As the Court recognized in *Noerr*, an antitrust plaintiff cannot prove an illegal conspiracy to weaken the "competitive position" of a competitor by reliance on "evidence * * * deal[ing] with [the defendants'] efforts to influence the pas-

sage and enforcement of laws." 365 U.S. at 142. To allow liability to be premised upon such evidence would be "tantamount to outlawing" the campaign to change the laws itself. *Id.* at 143-144. In the securities regulatory context, the same principle precludes efforts to state an antitrust claim based on inferences drawn from conduct that is explicitly or implicitly permitted by the securities laws.

B. Implied Immunity Does Not Shield From Antitrust Liability All Conduct Relating To The Sale Of Securities

Implied immunity thus extends to collaborative conduct that is explicitly or implicitly authorized under the securities laws and activity inextricably intertwined with such conduct. It does not follow, however, that petitioners are correct in contending that all conduct connected with initial public offerings is impliedly immune from antitrust liability because the SEC exercises "pervasive" regulatory authority over it. See Pet. 23; Pet. Supp. Br. 2-3. As this Court has instructed, "a cardinal principle of construction [is] that repeals by implication are not favored," *Silver*, 373 U.S. at 357 (quoting *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939)), and "can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system," *NASD*, 422 U.S. at 719-720; *National Gerimed.*, 452 U.S. at 388. "Repeal is to be regarded as implied only if necessary to make the [regulatory statute] work, and even then only to the minimum extent necessary." *Silver*, 373 U.S. at 357.[4] Thus, the Court has repeatedly rejected the view that all conduct regulated under another statutory scheme enjoys "a blanket exemption" from antitrust law. *National Gerimed.*, 452 U.S. at 392. See also *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 372 (1973) ("Activities which come under the juris-

[4] Indeed, even express statutory exemptions are narrowly construed. See, *e.g.*, *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966).

diction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws.").[5] Likewise, the conduct of underwriters is not categorically exempt from scrutiny under the antitrust laws merely because it takes place in the context of an IPO.

1. Notably, the Court did not apply a sweeping rule of implied repeal in either *Gordon* or *NASD*, both of which involved conduct regulated by the SEC. In *Gordon*, private plaintiffs sought treble damages for the fixing of commissions pursuant to exchange rules. The Court did not hold that the SEC's regulatory authority was so pervasive that it impliedly repealed all antitrust liability. 422 U.S. at 688-689. Rather, the Court focused on the fact that Congress had specifically granted the SEC "the power to fix and insure 'reasonable' rates" of commission, *id.* at 666, and the SEC, which had "thoroughly exercised its supervisory powers" over the system of fixed commissions, *id.* at 668, had effectively authorized the use of fixed rates during the time period at issue in the complaint, *id.* at 667-675, 689-690. As the Court explained, the SEC's approval of fixed rates was "not significantly different" from "an affirmative order to the exchanges to follow fixed rates." *Id.* at 689 n.13. Fixed commissions were not prohibited by the SEC until 1975, several years *after* the suit was filed. *Id.* at 660, 675.

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[5] In *Otter Tail*, there was no implied immunity because "nothing in the legislative history [of the Federal Power Act] * * * reveal[ed] a [congressional] purpose to insulate electric power companies from the operation of the antitrust laws." 410 U.S. at 373-374. Similarly, in *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), the Court held that the Bank Merger Act of 1960, which required the Comptroller of the Currency to review and approve certain bank mergers under a public interest standard, did not provide antitrust immunity for approved mergers because there was no evidence that Congress intended to oust antitrust enforcement. *Id.* at 352.

Similarly, in *NASD* the Court reviewed the legislative history of the securities statute and found that the challenged vertical restrictions on mutual fund sales and distributions were "among the kinds of restrictions Congress contemplated when it" granted the SEC authority to approve such rules. 422 U.S. at 721. The SEC exercised a significant oversight function, and its decision not to prohibit the contested restraints reflected the Commission's approval of those restrictions as well as of the challenged NASD rules and interpretations. *Id.* at 728, 733. That authorization, contemplated by Congress, could not be reconciled with application of the antitrust laws, under which the restrictions would have been illegal per se. *Id.* at 729, 733. Although the joint efforts of NASD members to encourage the kinds of restraints at issue were not themselves specifically required or approved, that conduct also was immune because it was "designed to encourage * * * precisely the restriction that the SEC consistently ha[d] approved pursuant to [statute] for nearly 35 years." *Id.* at 733. Certainly, nothing in *Gordon* or *NASD* supports petitioners' view that anticompetitive conduct that is and always has been *forbidden* under the securities laws is nonetheless categorically immune from liability under the antitrust laws.

2. In other areas of the law in which immunity extends to conduct that is "inextricably intertwined" with protected conduct, see p. 14, *supra*, the Court has recognized that the immunity doctrine does not sweep within its scope all conduct that bears any connection to the core protected conduct. The *Noerr-Pennington* doctrine, for example, does not permit competitors "to enter into horizontal price agreements as long as they wish[] to propose that price as an appropriate level for governmental ratemaking or price supports." *Allied Tube & Conduit*, 486 U.S. at 503. Similarly, in *FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), the Court held that a boycott by court-appointed attorneys was

not protected by the *Noerr-Pennington* doctrine, despite the boycott organizers' purpose to force the government to enact legislation increasing their compensation rates, but the doctrine did protect the defendants' separable efforts "to publicize the boycott, to explain the merits of its cause, and to lobby District officials to enact favorable legislation." *Id.* at 424-426. The Seventh Circuit has held that competitors who allegedly agreed to fix prices were not entitled to immunity under *Noerr* merely because they also had legitimate discussions about an industry position on price control legislation at the same meeting. See *In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 788-789 (7th Cir. 1999), cert. denied, 528 U.S. 1181 (2000).[6] Those cases recognize that the immunity for protected activity cannot be extended to the point of creating an antitrust-law-free zone, in which the legitimate basis for collaborative activity can be used as a shield to protect unrelated conspiracies.

By parity of reasoning, implied antitrust immunity does not extend to conduct that occurs in conjunction with permissible underwriting activities but can practicably be considered separately without chilling authorized underwriting activity. As in the *Noerr-Pennington* context, an illegal agree-

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[6] See also *Webb* v. *Utah Tour Brokers Ass'n*, 568 F.2d 670, 672-676 (10th Cir. 1977) (filing protests with government agencies in opposition to a potential competitor's application for certification was protected by *Noerr*; a conspiracy to boycott the potential competitor, discussed at the same meetings, was not); *Alexander* v. *National Farmers Org.*, 687 F.2d 1173, 1200-1203 (8th Cir. 1982) (litigation against a competitor arising from a genuine dispute was protected by *Noerr*; using that dispute "as a pretext for threatening litigation against and otherwise harassing" the competitor's customers was not), cert. denied, 489 U.S. 1081 (1989).

In the commercial/non-commercial speech context likewise, the Court has applied the less stringent standard for commercial speech in a setting where the commercial and non-commercial aspects of a presentation were easily distinguished. *Board of Trs. of State Univ.* v. *Fox*, 492 U.S. 469, 473-475 (1989).

ment to restrain competition is not shielded merely because it was entered into at the same place and time as a meeting of competitors that is authorized by the securities laws. Thus, while immunity is justified by the need to protect authorized underwriting syndicate activity in connection with an IPO, that immunity will not extend to conduct beyond the scope of the IPO, if an alleged antitrust violation is proved without reliance on permitted IPO syndication activities. For example, underwriters in an IPO syndicate would not be entitled to implied antitrust immunity to the extent they used a road show meeting as an occasion to allocate exclusive territories for the placement of new branch brokerage offices. The question in each case is whether, as a practical matter, the alleged antitrust violation is separable from conduct authorized under the securities laws, such that activity protected under the securities laws or inextricably intertwined with such activity (or inferences drawn from such activity) will not serve as the basis for imposition of antitrust liability.

Distinguishing between permissible and impermissible conduct in the IPO context can present close and difficult questions in some circumstances. See, *e.g.*, *Commission Guidance*, 70 Fed. Reg. at 19,676. But the difficulties have not proven insuperable in the *Noerr-Pennington* context, and they should not preclude application of the distinction in this context. Contrary to petitioners' apparent suggestion (see Pet. Supp. Br. 2-4), it does not follow that every alleged agreement among IPO participants to inflate prices through tie-ins or laddering is necessarily immune from antitrust scrutiny on the ground that it is inextricably intertwined with approved conduct. As previously discussed, see pp. 11-14, *supra*, such an antitrust claim would be clearly barred to the extent plaintiffs challenge conduct that should be deemed immune because—while it might ultimately be found impermissible under the regulatory scheme—it is so closely related

to approved collaboration in the course of underwriting an IPO that it cannot, as a practical matter, be readily distinguished and separately proved without impermissibly chilling permitted conduct. Likewise, plaintiffs may not plead or prove an illegal conspiracy on the basis of inferences drawn from attendance at road shows, participation in discussions of topics within the scope of legitimate book-building, or similar permitted conduct.

There is no basis, however, for holding as a categorical matter that an antitrust violation can *never* be proven in the IPO context because any such claim would necessarily rely on, or call into question, approved collaboration among members of the underwriting syndicate. If, for example, underwriters entered an express horizontal agreement to restrict competition through practices not authorized under the securities regulatory scheme and outside the scope of the collaboration in underwriting and promoting a particular IPO, neither the securities laws nor the antitrust laws—both of which condemn aspects of the conduct—should immunize the misconduct. While courts should demand specific allegations of forbidden misconduct and disallow inferences from authorized conduct, automatic dismissal of all antitrust claims involving conduct related to the IPO process is not necessary in order to preclude only those suits founded upon conduct that constitutes, or is inextricably intertwined with, permissible underwriting activity.

3. Petitioners' ultimate argument (Pet. 27-28) is that the Court should, as an exercise of judicial policymaking, confer broad antitrust immunity for conduct relating to the securities markets because, in petitioners' view, the prospect of treble damages awards by federal juries applying the antitrust laws will unduly disrupt the capital formation process. While those concerns are legitimate and counsel in favor of both extending immunity beyond the scope acknowledged by

the court of appeals and carefully scrutinizing complaints, see pp. 11-16 , *supra*, to the extent that petitioners seek a blanket immunity, such arguments are properly directed to Congress, not the courts. Congress has enacted various express antitrust exemptions, and has placed restrictions on certain types of actions under the securities laws,[7] but as yet it has not chosen to confer the blanket immunity from antitrust liability that petitioners urge.

Congress, moreover, has the flexibility to tailor express immunity to serve the ends of both the securities and antitrust laws. If it so chose, for example, Congress could confer immunity from treble damages suits while allowing the Department of Justice to continue to bring enforcement actions. By contrast, the sweeping antitrust immunity endorsed by the district court and urged on this Court by petitioners would oust not only private treble damages actions but also government antitrust enforcement from the securities industry. Contrary to petitioners' suggestion (Pet. 30), application of the securities laws does not render the antitrust laws superfluous to the IPO process. The two statutory schemes serve complementary but distinct purposes, and conduct that is prohibited by one may or may not violate the other. For example, the securities laws prohibit an underwriter's unilateral manipulation of the market through mandated laddering arrangements, whereas such conduct by a single underwriter would not necessarily give rise to antitrust liability. But the antitrust laws do address, in a way that the securities laws do not, the distinct evil of a conspiracy across underwriters and across IPOs to require such arrangements of all purchasers. There is no evidence that Congress intended, as petitioners

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[7] See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737; Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227.

suggest, to leave vindication of the antitrust laws' policy of competition to enforcement of the securities laws alone.[8]

II. RESPONDENTS' CLAIMS ARE BARRED TO THE EXTENT THEY REST ON INFERENCES ARISING FROM ALLEGATIONS REGARDING PERMISSIBLE COLLABORATIVE ACTIVITY OR CONDUCT INEXTRICABLY INTERTWINED WITH SUCH ACTIVITY

A. The decision of the court of appeals fails to provide adequate protection for the securities laws' policy of encouraging certain types of collaborative activity. As the government's amicus filings in the lower courts emphasized, many of the more specific factual allegations in the complaint describe collaboration among underwriters that the SEC permits, and in some instances encourages, as part of the capital formation process. Underwriters of an IPO are authorized, in furtherance of that IPO, to combine into underwriting syndicates; to agree that the lead underwriter will distribute all the shares and that all syndicate members will share in the underwriters' discount; to hold meetings of investment bankers, legal officers, and market makers; and to disclose information about each underwriter's IPO customers. See Pet. App. 154a-155a, 177a, 206a-207a (referring, in particular, to

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[8] The Department of Justice cooperates with the SEC to identify and address potential violations of the antitrust laws, as well as related competitive concerns under the securities laws. The Department has brought antitrust enforcement actions against, for example, anticompetitive agreements related to conventions for quoting stock prices, see *Stipulation and Order and Competitive Impact Statement*, United States *v.* Alex. Brown & Sons, Inc., 61 Fed. Reg. 40,439 (1996), and hedge fund trading of U.S. Treasury notes, see *Proposed Final Judgment and Competitive Impact Statement*, United States *v.* Steinhardt Mgmt. Co., 60 Fed. Reg. 3263-3264 (1995). The Department also investigates joint ventures and acquisitions in the securities industry. The Department's enforcement of antitrust laws in the securities context has saved consumers billions of dollars.

specific conduct alleged in Am. Compl. ¶¶ 38, 39, 45-48, 56, 62). Underwriters are also authorized to collaborate as members of trade associations and exchanges in accordance with SEC-approved rules. See Pet. App. 154a (referring to Am. Compl. ¶ 47). All such conduct is immune from antitrust scrutiny, as is any related conduct that cannot practicably be separated from it.

The court of appeals recognized that "the complaint details a host of conduct recognized as legitimate by the SEC," and that it would be necessary to "ensur[e] that defendants do not suffer prejudice from any evidence of their legitimate activities." Pet. App. 61a n.47. But the court failed to appreciate fully the relationship between the complaint's reliance on permissible conduct and its vague and conclusory allegations of a conspiracy to raise prices through prohibited laddering and tie-ins, which appear to rest in part or in whole on inferences from potentially permissible conduct. The court thus erred in conclusively resolving the implied antitrust immunity issue in respondents' favor merely because the complaint includes conclusory allegations of conduct that is forbidden by the securities laws. See *id.* at 70a ("find[ing] no repeal" of the antitrust laws and remanding only for consideration of "alternate grounds" for dismissal).

The issue with respect to implied immunity is not whether a regulatory violation has been alleged. See *Trinko*, 540 U.S. at 406 (creation of duties under regulatory scheme "does not automatically lead to the conclusion that they can be enforced by means of an antitrust claim"). Rather, the question is whether the complaint adequately alleges an antitrust offense, without reliance on conduct that is authorized under the regulatory scheme or that is inseparable from such conduct. A complaint must allege facts that provide the defendant with concrete notice of the claims against it, *Conley* v. *Gibson*, 355 U.S. 41, 47 (1957), and give rise to a reasonably

grounded belief that the plaintiff may ultimately be able to prove its claim, see *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005). In the context of this suit, therefore, the complaint's allegations must give rise to a reasonably grounded inference of an antitrust violation without relying on conduct that was authorized under the regulatory scheme or inextricably intertwined with such immune conduct.

The government does not, as respondents contend (Resp. Supp. Br. 3), urge the Court to adopt "a novel pleading standard." Rather, the government relies on the accepted principle that the adequacy of a complaint to demonstrate a reasonable basis for inferring wrongful conduct must be measured against the substantive legal standards applicable to that claim. See *Dura Pharms.*, 544 U.S. at 341-342; see also James Wm. Moore et al., *Moore's Federal Practice* § 8.04[1][a] at 8-24.1 (3d ed. 2006) ("Whether a statement of claim is sufficient to give fair notice depends in part on the complexity of the case."). As this Court has observed, it is essential that a district court "retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated Gen. Contractors of Cal., Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983).

In short, "the appropriate level of generality for a pleading depends on the particular issue in question or the substantive context of the case before the court." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1218, at 273 (3d ed. 2004) (Wright & Miller). In the context of this case, the substantive standard is set by the imperative need to avoid conflict with the securities regulatory regime. Accordingly, the complaint must make clear that the claims alleged do not rest on impermissible inferences from protected conduct. A court should not permit discovery to go forward as a fishing expedition based on conclusory or ambig-

uous allegations that focus on immune conduct. See generally U.S. Br. in *Bell Atlantic Corp.* v. *Twombly*, No. 05-1126.

B. In view of the complaint's extensive reliance on allegations of immune conduct, the court of appeals erred in categorically rejecting petitioners' immunity defense without considering whether respondents' allegations of prohibited conduct can, as a practical matter, be separated from conduct that is permitted by the regulatory scheme. In this case, it is particularly difficult to discern whether respondents have adequately pleaded non-immune anticompetitive conduct sufficient to defeat the motion to dismiss on implied immunity grounds. The allegations of forbidden tie-in and laddering agreements are largely confined to conclusory assertions in the background section of the complaint, whereas the more specific factual allegations concerning the alleged unlawful conspiracy detail conduct that is (or might be) immune.

For example, in their "Summary of Allegations," Am. Compl. 1, respondents allege that petitioners "agree[d] to require that, in order to obtain IPO shares of a Class Security, customers had to place bids for and/or purchase quantities of such Class Security in the aftermarket at prices above the IPO price in order to systematically and significantly inflate the after-market prices of IPOs—a practice known as 'laddering.'" *Id.* ¶ 7. However, in the section of the complaint headed "The Making and Implementation of Defendants' Unlawful Agreement," *id.* at 19, which lays out the acts petitioners are alleged to have taken in connection with the unlawful agreements, the more specific allegation regarding "laddering" is that during "road shows" and other communications with customers before the IPOs, petitioners "at times jointly, made inquiries of customers or others interested in purchasing Class Securities concerning the number of shares that such person would be willing to purchase in the aftermarket and the prices such person would be willing to pay for

such shares." *Id.* ¶ 54. That allegation is sufficiently vague that it encompasses permissible book-building conduct between underwriters and investors that the SEC has specifically approved as important in determining the size and price of the offering as well as the allocation of shares, based on understanding long-term investor interest in and valuation of the company. The *Commission Guidance* specifically permits inquiries "as to customers' desired future position in the longer term (for example, three to six months) and the price or prices at which the customer might accumulate that position," while clarifying that "inquir[ing] whether the customer intends to place orders in the immediate aftermarket, and if so, at what prices and quantities" is prohibited under the securities laws as an impermissible tie-in. 70 Fed. Reg. at 19,676.

The structure of respondents' complaint, which asserts the existence of a prohibited conspiracy in conclusory fashion in the "Summary" and supports that claim with more particular allegations of conduct that is (or may be) immune from antitrust challenge, strongly suggests that respondents' allegation of an illegal conspiracy is no more than an inference that respondents have drawn from protected collaboration among petitioners—an inference that is forbidden by principles of implied antitrust immunity. To the extent the complaint is ambiguous whether the specific conduct on which respondents premise their broad allegations of illegal tie-ins and laddering is itself entitled to immunity, respondents should be required to re-plead to make clear that they are not relying on protected activities as a necessary component of their claim. See Fed. R. Civ. P. 12; *Crawford-El* v. *Britton*, 523 U.S. 574, 598 (1998) (district "court may insist that the plaintiff 'put forward specific nonconclusory allegations' that establish" a violation "in order to survive a prediscovery motion for dismissal or summary judgment," and Rule 12(e) is one of the "primary options prior to permitting any discovery

at all" to do so) (citation omitted). By categorically rejecting petitioners' immunity defense and thereby foreclosing the district court on remand from dismissing on immunity grounds with leave to re-plead, the court of appeals failed to give adequate effect to the securities laws.

At the same time, the district court's dismissal of the complaint with prejudice, based on the SEC's "broad general authority to regulate IPO allocation and underwriter commission practices," Pet. App. 94a, is inconsistent with this Court's repeated rejection of "a blanket exemption" from antitrust law for all conduct regulated under another statutory scheme, *National Gerimed.*, 452 U.S. at 392. Thus, the court of appeals was correct to vacate the district court's dismissal of the complaint with prejudice. See 5B Wright & Miller, § 1357, at 739 ("[L]eave to amend should be refused only if it appears to a certainty that the plaintiff cannot state a claim."); cf. *United States* v. *Georgia*, 126 S. Ct. 877, 882 (2006) (once a vague complaint is amended on remand, the lower courts can determine which aspects of the alleged conduct would violate the Constitution or the relevant statute and the extent to which that conduct is protected by sovereign immunity). Respondents should be given an opportunity on remand to amend their complaint unless it appears to a certainty that they cannot allege, in good faith and in compliance with Federal Rule of Civil Procedure 11(b), facts sufficient to state an antitrust claim that does not rely on authorized conduct.

C. Even if the district court on remand were ultimately to deny a motion to dismiss on antitrust immunity grounds, its obligation to avoid conflict between the antitrust laws and the regulatory scheme would not cease. As the court of appeals observed, Pet. App. 61a n. 47, the district court has a continuing obligation to ensure that petitioners are not prejudiced by virtue of their legitimate conduct. Accordingly, the court must exercise its power to manage this complex action,

see Fed. R. Civ. P. 16, and use its "broad discretion to tailor discovery narrowly and to dictate the sequence of discovery," *Crawford-El*, 523 U.S. at 598; see Fed. R. Civ. P. 26.

The district court must also strictly limit any use of evidence of protected activity, see Fed. R. Evid. 105,[9] and exclude that evidence when (as will often be true) it is irrelevant or unduly prejudicial, see Fed. R. Evid. 402, 403; cf., *e.g.*, *United States Football League* v. *NFL*, 842 F.2d 1335, 1374-1375 (2d Cir. 1988) (evidence of conduct protected by *Noerr-Pennington* doctrine properly excluded from antitrust case because more prejudicial than probative); *Feminist Women's Health Ctr.* v. *Mohammad*, 586 F.2d 530, 543 n.7 (5th Cir. 1978) (same), cert. denied, 444 U.S. 924 (1979). "[C]are must be taken not to allow proof of a vague 'overall scheme' on the basis of the protected activities alone." 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 212, at 285 (2d ed. 2000). And if at any point the district court determines that respondents cannot establish an antitrust violation without relying on conduct that is authorized by the regulatory scheme or cannot be practicably separated from authorized conduct, the court must grant judgment for petitioners. See Fed. R. Civ. P. 12(b)(6), 12(c), 50, 56(a).

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[9] For example, evidence that at various times and places the defendants held meetings, during which they allegedly engaged in both authorized collaboration and unauthorized and separable collusion, might be relevant for the limited purpose of providing the necessary context to the antitrust conspiracy. Cf. *United Mine Workers* v. *Pennington*, 381 U.S. 657, 670-71 n.3 (1965) (evidence of protected activity may be admissible to show the purpose and character of other conduct, but only if "probative and not unduly prejudicial"). As we have noted, however, see pp. 14-16, *supra*, an antitrust plaintiff should not be permitted to establish an antitrust violation on the basis of inferences drawn from conduct that is immune from antitrust scrutiny because it is approved under the regulatory scheme.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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